No. 92-1639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF BARRON COUNTY, WISCONSIN, BROWARD COUNTY, FLORIDA, CITY OF AKRON, OHIO, CITY OF ALEXANDRIA, VIRGINIA, CITY OF AMES, IOWA, CITY OF HARRISBURG, PENNSYLVANIA, CITY OF INDIANAPOLIS, INDIANA, CITY OF TAMPA, FLORIDA, CONCORD REGIONAL SOLID WASTE/RESOURCE RECOVERY COOPERATIVE, COUNTY BOARD OF ARLINGTON, VIRGINIA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, DELAWARE COUNTY SOLID WASTE AUTHORITY, FAIRFAX COUNTY, VIRGINIA, GREATER DETROIT RESOURCE RECOVERY AUTHORITY, JOINT BOARD OF OVERSIGHT FOR THE HAMPTON/NASA/USAF REFUSE-FIRED STEAM GENERATING FACILITY, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, MINNESOTA RESOURCE RECOVERY ASSOCIATION,
(Additional *Amici* listed on inside cover)
IN SUPPORT OF PETITIONERS

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This brief *amici curiae* is submitted in support of petitioners City of Chicago, *et al.* *Amici* believe that the decision below, *Environmental Defense Fund, Inc. v. City of Chicago*, 985 F.2d 303 (7th Cir. 1993), which concluded that ash residue from the operation of waste-to-energy, resource recovery facilities is subject to the hazardous waste management standards of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939 (1988), contradicts the plain meaning and legislative intent of section 3001(i) of RCRA, 42 U.S.C. § 6921(i), and is antithetical to the objectives and policies of RCRA as a whole.[1] As such, the decision undermines the carefully designed solid waste management plans of local governments throughout the United States and poses a serious obstacle to sound management of the Nation's growing municipal solid waste stream.

The petitioners and respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF *AMICI*

Amici include cities, counties, local government agencies and organizations who have primary responsibility for managing the growing solid waste crisis that confronts our Nation. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, EPA/530-SW-89-019 (February 1989) (cited below as "*Agenda For Action*"). Meeting that responsibility has required *amici* and their constituents to balance carefully all of the public health, environmental and economic concerns involved in managing the municipal waste stream.

[1] The decision of the Seventh Circuit was entered following this Court's order vacating the initial court of appeals' decision in this matter. *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992) (Circuit Judge Ripple dissented in both instances).

That is the context in which *amici* have focused on the development of resource recovery facilities as a very important solid waste management tool.

In some instances, *amici* both own and operate resource recovery facilities. Other *amici* own resource recovery facilities that are operated by private vendors. Still others have entered long-term contracts with privately owned and operated resource recovery facilities. More specifically, *amici* include a number of cities and counties (Akron, Ohio; Alexandria, Virginia; Ames, Iowa; Arlington, Virginia; Barron County, Wisconsin; Broward County, Florida; Fairfax County, Virginia; Harrisburg, Pennsylvania; Hempstead, New York; Indianapolis, Indiana; Nashville, Tennessee; New Hanover County, North Carolina; St. Croix County, Wisconsin; and Tampa, Florida). Other *amici* are local government agencies and special authorities (Concord Regional Solid Waste/Resource Recovery Cooperative; Davis County Solid Waste Management and Energy Recovery Special Service District (Utah); Delaware County Solid Waste Authority (Pennsylvania); Greater Detroit Resource Recovery Authority; Joint Board of Oversight, Hampton/NASA/USAF Refuse-Fired Steam Generating Facility (Virginia); Resource Authority in Sumner County, Tennessee; Solid Waste Authority of Central Ohio; Solid Waste Disposal Authority of the City of Huntsville, Alabama; Southeastern Public Service Authority of Virginia; Tulsa Authority for Recovery of Energy and City of Tulsa, Oklahoma; York County Solid Waste and Refuse Authority (Pennsylvania); and the Northeast Solid Waste Committee (Massachusetts)).[2]

[2] The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southhampton. The Northeast Solid Waste Committee is established under Massachusetts law as a corporate entity performing governmental functions concerning waste management on behalf of the following Massachusetts communities: Acton, Andover,

Amici also include national and regional organizations concerned with solid waste management. *Amicus* Municipal Waste Management Association (MWMA) is a national membership association of solid waste professionals who are responsible for comprehensive solid waste management systems within local government. Formed in 1982 to address our cities' municipal solid waste management needs (MWMA is affiliated with The United States Conference of Mayors), the MWMA brings together local governments and other organizations with a common interest in municipal solid waste management through reduction, recovery, reuse and recycling of materials and energy from the waste stream. *Amicus* Solid Waste Association of North America (SWANA) is a nonprofit educational organization serving individuals and communities that manage and operate municipal solid waste management systems. SWANA's 5,000 members are primarily municipal, county and regional public officials who are responsible for municipal solid waste management systems, but also include private sector companies that provide equipment and consulting services in the field of municipal solid waste management. Another of the *amici*, the Minnesota Resource Recovery Association, is an association consisting primarily of public entities working with the private sector in the development,

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Arlington, Bedford, Belmont, Boxborough, Burlington, Carlisle, Dracut, Hamilton, Lexington, Lincoln, Manchester, North Andover, North Reading, Peabody, Tewksbury, Watertown, Wenham, Westford, West Newbury, Wilmington and Winchester. The Concord Regional Solid Waste/Resource Recovery Cooperative is a nonprofit cooperative corporation formed for the purpose of providing municipal solid waste management for the following New Hampshire communities: Allenstown, Andover, Belmont, Boscawen, Bow, Bradford, Bristol, Canterbury, Concord, Deering, Dunbarton, Franklin, Gilford, Gilmanton, Henniker, Hill, Hillsborough, Hopkinton, Laconia, Loudon, Northfield, Pembroke, Salisbury, Tilton, Warner, Weare and Webster.

ownership and operation of resource recovery facilities and other types of waste management facilities.[3]

Resource recovery facilities are key components of the integrated waste management plans that *amici* and many other local governments throughout the United States are pursuing (integrated waste management means the complementary use of several waste management methods—source reduction, reuse and recycling, waste combustion with energy recovery and landfilling—to handle waste in an environmentally sound and economical manner). *Agenda for Action* at 16. Resource recovery facilities use municipal solid waste as fuel to produce steam and electricity. *See* 42 U.S.C. § 6903(24).[4] These environmentally sound facilities also produce ash residue as a result of the combustion process, and manage the ash as nonhazardous waste consistent with the requirements of Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949, and related state laws.

The implications of the court of appeals' decision that such ash is instead governed by RCRA's hazardous waste management standards are severe. The resource recovery facilities that *amici* represent produce thousands of tons of ash daily and are designed to operate 365 days a year. On a composite basis the 142 resource recovery facilities

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[3] The Minnesota Resource Recovery Association represents waste-to-energy facilities serving the Minnesota counties of Anoka, Beltrami, Benton, Carver, Cass, Clay, Clearwater, Dodge, Douglas, Goodhue, Grant, Hennepin, Hubbard, Itasca, Mahnomen, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin, and the Minnesota cities of Red Wing and Fergus Falls. Other members of the Association are: Winona and Dakota Counties, Northern States Power Company, United Power Association, Quadrant Company and Richards Asphalt.

[4] The term "municipal solid waste" (or "MSW") refers primarily to residential solid waste, with some contribution of solid (nonhazardous) waste from commercial, institutional and industrial sources. 40 C.F.R. § 241.101(k).

now operating in the United States produce approximately 8.5 million tons of ash annually. *See* Jonathan V.L. Kiser, *Municipal Waste Combustion in North America: 1992 Update*, Waste Age 30, Figure 2 (November 1992) (ash tonnage calculated based on data presented). The decision below raises serious financial implications for managing this ash as hazardous waste and undermines the solid waste management plans of *amici* and many other communities throughout the United States that have turned to resource recovery as an environmentally sound strategy for municipal solid waste management.

SUMMARY OF ARGUMENT

The Resource Conservation and Recovery Act explicitly encourages the development of resource recovery facilities as an important means for reducing both our Nation's reliance on diminishing fossil fuel resources and the burden of disposing ever-increasing volumes of municipal solid waste. Consistent with those statutory objectives, RCRA section 3001(i) further encourages the development of resource recovery facilities by exempting from hazardous waste regulation the ash produced by such facilities. Specifically, RCRA section 3001(i) provides, in pertinent part, that a resource recovery facility burning municipal solid waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." This statutory provision originated from EPA's explanation of the "household waste exclusion" which provides that household waste is exempt from regulation as a hazardous waste under RCRA "in all phases of its *management*", including the ash resulting from the combustion of municipal solid waste (emphasis added). Repeating the terminology used by EPA to define the scope of the "household waste exclusion", RCRA section 3001(i) codified the "household waste exclusion" as applied to resource recovery facility ash by the section's express use of the term "otherwise managing". That

result is confirmed by the legislative history of section 3001(i).

The contrary decision of the court of appeals—based solely on the absence of the word "generation" from the list of resource recovery facility activities exempt from hazardous waste regulation—ignores the plain language and legislative intent of section 3001(i) and contravenes the explicit objectives of RCRA to promote the development of environmentally beneficial resource recovery facilities. Moreover, the court of appeals improperly declined to defer to the EPA Administrator's reasonable interpretation of RCRA section 3001(i), which concludes that ash from resource recovery facilities is exempt from RCRA's hazardous waste regulations. The court of appeals' decision poses severe consequences for local government. The decision undermines local solid waste management plans that are carefully designed to balance public health, environmental, and economic concerns, threatens the financial viability of most, if not all, resource recovery facilities due to the high cost of managing ash as a hazardous waste, and encourages environmentally inferior methods of solid waste disposal.

ARGUMENT

I. CONSISTENT WITH THE OBJECTIVES AND POLICIES OF RCRA, SECTION 3001(i) EXEMPTS RESOURCE RECOVERY FACILITY ASH RESIDUE FROM HAZARDOUS WASTE REGULATION

As often recognized by this Court, the meaning of a statute is determined by the particular language at issue within the context of the statute as a whole, including its object and policy. *E.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Section 3001(i) of RCRA, the statutory provision at issue here, states in relevant part that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" (section 3001(i) is reproduced in the Appendix to this brief). Because the word "generation" is not included in the phrase "treating, storing, disposing of, or otherwise managing", the Seventh Circuit concluded that the ash residue of a resource recovery facility is subject to regulation as hazardous waste under RCRA. That narrow reading of section 3001(i) ignores the fundamental tenet of statutory construction that words have meaning only in context and is incompatible with the solid waste management policies and objectives of RCRA.[5]

A. The Plain Language And Legislative Intent Of RCRA Section 3001(i) Exempt Resource Recovery Facility Ash Residue From Regulation As A Hazardous Waste

The genesis of RCRA section 3001(i), as well as the context for interpreting its meaning, lies in EPA's "household waste exclusion".[6] Adopted in 1980 as part of EPA's regulations governing RCRA's hazardous waste management program, the household waste exclusion implemented congressional intent to exclude waste streams produced at the household level from hazardous waste management. *See* 45 Fed. Reg. 33084, 33099 (May 19, 1980) (quoting S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976)) (RCRA's hazardous waste management program "is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances"). In the preamble accompanying promulgation of the household waste exclusion, EPA explained that "[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). Importantly, EPA emphasized that incinerator ash was not subject to hazardous waste regulation because the exclusion applies to "all phases of [the] management" of household waste, including ash residue after treatment, such as incineration.

Congress is presumed to know an agency's interpretation of a law pertinent to legislation Congress is enacting, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and in 1984 when Congress enacted section 3001(i)—the "Clarification of the household waste exclusion", the

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[5] The only other circuit to interpret RCRA section 3001(i) concluded that the statute exempts ash residue from regulation as a hazardous waste. *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 453 (1991).

[6] The "household waste exclusion" provides as follows:

> The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (*e.g.*, refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

40 C.F.R. § 261.4(b) (codified as amended).

regulatory status of MSW ash was clear: ash remaining after incineration of household waste was not subject to RCRA Subtitle C hazardous waste regulation because the household waste exclusion already encompassed "all phases of [the] management" of household waste. *See City of Chicago,* 948 F.2d at 349 (EPA's 1980 preamble "most definitely exempted ash from regulation as a hazardous waste"). The focus of Congress' "clarification" in 1984 was whether EPA's 1980 regulation limiting the exclusion only to household waste—as opposed to including waste from non-household sources that contribute to the municipal waste stream (*e.g.,* small commercial and industrial establishments, schools, etc.)—was consistent with Congress' intent. As explained in the Senate Report that accompanied the 1984 legislation:

> Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. * * * *New section 3001(d)* [*sic*] *clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.*

S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis added). Directly reflecting that intent, the statute provides that a resource recovery facility burning municipal solid waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if the facility receives and burns only household waste and nonhazardous commercial or industrial solid wastes and establishes appropriate procedures to assure that hazardous wastes are neither received nor incinerated at the facility. 42 U.S.C. § 6921(i). In short, section 3001(i) "clarified" the preexisting household waste exclusion by providing that a resource recovery facility that burns

household waste *and* nonhazardous waste from sources other than households (*e.g.,* commercial sources) will remain entitled to the exclusion if precautions are taken to ensure that the facility does not accept or incinerate hazardous waste.

The court of appeals' majority ignores this context and narrowly reads section 3001(i) as an evisceration of EPA's regulatory position by focusing on the absence of the word "generation" in section 3001(i). The absence of the word "generation" to identify activities of resource recovery facilities that are exempt from hazardous waste regulation is, however, entirely consistent with the language used by EPA to explain the household waste exclusion—"[s]ince household waste is excluded in *all phases of its management,* residues remaining after treatment (*e.g.,* incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). That is precisely what the statute says—activities that would constitute "otherwise managing hazardous wastes," which necessarily includes ash residue remaining after waste-to-energy combustion, are excluded from regulation as a hazardous waste.

Key legislative history, moreover, confirms that section 3001(i)'s use of the phrase "otherwise managing" was intended to exclude resource recovery facility ash from hazardous waste regulation. Specifically, the Senate Report, *supra,* accompanying the legislation describes the section 3001(i) exclusion as follows: "All waste *management* activities of such a facility, including the *generation,* transportation, treatment, storage and disposal of waste shall be covered by the exclusion. . . ." S. Rep. No. 284 at 61 (emphasis added).[7] When examined in this overall

[7] Importantly, the Conference Committee adopted the Senate's proposed clarification of the household waste exclusion without change. H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984).

context, the court of appeals' myopic reliance on the absence of the word "generation" in section 3001(i) is plainly misplaced.

The decision below also renders section 3001(i) essentially meaningless. Simply put, a resource recovery facility that accepts only household waste (deemed nonhazardous by EPA's household waste exclusion, *supra*, 40 C.F.R. § 261.4(b)(1)) and nonhazardous commercial or industrial waste would never be "treating, storing, disposing of, or otherwise managing hazardous wastes" and, thus a separate statutory exemption for such activities—section 3001(i)—would not be needed. As explained by the district court in *Wheelabrator, supra* note 5, if resource recovery facility ash is not excluded from hazardous waste regulation, "it is difficult to understand what, if any benefit resource recovery facilities derive from the exemption." 725 F. Supp. at 763 n.12. In short, the only meaningful interpretation of RCRA section 3001(i) is that it exempts resource recovery facility ash from regulation as a hazardous waste.

B. The Only Interpretation Of RCRA Section 3001(i) That Serves RCRA's Objectives And Policies Is That Ash Produced At A Resource Recovery Facility Is Exempt From Hazardous Waste Regulation

The court of appeals' interpretation of RCRA section 3001(i) is also incompatible with the objectives and policies of RCRA as a whole. Since enactment of the Solid Waste Disposal Act in 1976, Congress has on numerous occasions expressed its intent to promote resource recovery facilities in order to achieve RCRA's goals of protecting health and environment and conservation of material and energy resources. *See* 42 U.S.C. § 6902 (a)(1) (objectives of RCRA include promotion of resource recovery and resource conservation systems). More specifically, in adopting the Solid Waste Disposal Act Amendments of 1980, Congress expressly recognized

that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste." 42 U.S.C. § 6941a. *See also* S. Rep. No. 284 at 61 ("[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation").[8]

Congress' intent to encourage resource recovery facilities as environmentally beneficial solid waste management tools is also evident in RCRA's warnings that "land is too valuable a national resource" to be devoted to disposal of most of our solid waste, and that "alternatives to existing methods of land disposal must be developed". 42 U.S.C. §§ 6901(b)(1) and (8). Consistent with those statutory objectives, waste combustion with energy recovery is favored over landfilling, the principal alternative. *See 1990 Update* at 4; *1992 Update* at 1-4; *see also* 54 Fed. Reg. 52209, 52245 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in [a municipal waste combustor] [rather] than to landfill them. Not only is landfilling a disfavored waste management option (see RCRA section 1002(b)(8)), but it is

[8] The volume of municipal solid waste in the United States, as well as the burden of disposing that waste, continues to increase steadily. For the most recent three-year period for which EPA survey data are available (1988-90), MSW increased by 9 percent—180 million tons to 195.7 million tons. U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA/530-R-92-019, ES-3 (July 1992) (cited below as *"1992 Update"*); U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, EPA/530-SW-90-042, ES-3 (June 1990) (cited below as *"1990 Update"*). Moreover, EPA projects an increase to 222 million tons by the year 2000. *1992 Update* at ES-3.

sound policy to recover the energy value of the combustibles rather than burying them") (citations omitted).[9]

The objectives and policies of RCRA encouraging the production of usable energy from waste to reduce both our reliance on diminishing fossil fuel resources and the burden of disposing of increasing volumes of MSW directly parallel numerous state laws that vigorously encourage expanded use of resource recovery facilities and decreased reliance on landfilling of municipal solid waste. For example, section 2(b) of the Tennessee Solid Waste Planning and Recovery Act, Tenn. Stat. Ann. § 68-31-602(b), provides that, among other things, "waste-to-energy incineration (resource recovery) will substantially lessen our dependence on landfills as a means of disposing of solid waste, aid in the conservation and recovery of valuable resources, [and] conserve energy in the process. . . ." Likewise, section 32(f) of the Michigan Solid Waste Management Act, Mich. Comp. Laws § 299.432(4), prescribes a statewide "strategy to encourage resource recovery and establishment of waste-to-energy facilities" with the "goal of reducing land disposal to unusable residuals by the year 2005".[10] The

[9] Combustion reduces waste volume or mass by approximately 90 percent. *See* Jonathan V.L. Kiser, *A Comprehensive Report on the Status of Municipal Waste Combustion*, Waste Age 109, 156 (November 1990). *See also* Michigan Department of Natural Resources, *Michigan Solid Waste Policy* 6 (1988) (although landfilling is still the least costly waste management option, it is also "the least desirable option because of the risk of groundwater contamination and the waste of some valuable materials"); Commonwealth of Massachusetts, Department of Environmental Protection, *Toward a System of Integrated Solid Waste Management/The Commonwealth Master Plan* 45 (June 1990) ("Preferable to landfilling for the management of most wastes, combustion offers more effective environmental control and monitoring systems with less potential for long-term, irreversible damage to the environment"); N.H. Code Admin. R. 149-M:1-a (waste-to-energy technologies are preferred over landfilling).

[10] *See also* Fla. Stat. Ann. § 377.709 (MSW combustion "to supplement the electricity supply not only represents an effective conservation effort but also represents an environmentally preferred alternative to conventional solid waste disposal"); Pa. Stat. Ann. title 35, § 6018.102(2) (encouraging the development of resource recovery facilities "as a means of managing solid waste, conserving resources, and supplying energy"); Va. Code Ann. § 10.1-1402 (Virginia Waste Management Board directed to promote the development of resource recovery systems); *Michigan Solid Waste Policy, supra* note 9 (establishes goal of managing 35 to 45 percent of the state's municipal waste through the use of resource recovery facilities and reducing the amount of MSW going to landfills to 10 percent by the year 2005).

result of these laws and policies has been a significant increase in the development of waste-to-energy, resource recovery facilities (employing state-of-the-art air pollution control systems) by local government as part of integrated solid waste management plans (which also include source reduction, recycling, etc.). Between 1985 and 1990 annual combustion of MSW with energy recovery increased from 7.6 to 29.7 million tons. *1992 Update* at 3-2, Table 24; *see also id.* at 3-3. The 1990 level is projected to increase more than 50 percent by the year 2000 and reach 46.2 million tons. *Id.* at 4-16 and 4-18, Table 34. An important source of electric energy, the federal government has projected a seven-fold increase between 1991 and 2010 in the amount of electricity generated in the United States from MSW combustion. *See* U.S. Dept. of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

The court of appeals' decision contravenes the policies and objectives of RCRA (and the state statutes and policies which it spawned) and imposes a classic "Catch-22" on *amici* and many other communities that followed Congress' lead and developed resource recovery facilities. These actions were taken with knowledge that resource recovery facilities were not only environmentally superior, but also generally more costly in the short run than landfilling MSW.[11] If the ash residue from a resource recovery

[11] The processing or "tipping" fees charged by modern resource recovery facilities are generally $40 to $100 per ton of municipal

facility must now be managed subject to hazardous waste standards, operating costs will increase dramatically. For example, recent EPA data show that the cost of disposal in a hazardous waste landfill is ten times the cost of disposal at a nonhazardous waste (Subtitle D) landfill:

> Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton.

Memorandum from William K. Reilly, Administrator, U.S. EPA, to all Regional Administrators, Subject: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i), at 7 (September 18, 1992) (cited below as "EPA Administrator's Memorandum"), *reprinted in* the appendix to Petition for a Writ of Certiorari ("Pet. App."), S. Ct. Case No. 92-1639, 41a, 48a-49a. As a consequence of that more than ten-fold increase in ash disposal costs as well as other costs associated with managing ash as a hazardous waste (e.g., ash testing, employee training, etc.), the tipping fees charged by individual resource recovery facilities could easily double or triple.[12] The economic burden

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solid waste processed. Kiser, *supra* note 9, at 156. In contrast, the 1990 average landfill tipping fee in the United States was $26.56 per ton. National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6, Table 10 (1991). Resource recovery facilities are generally more costly than landfilling because of the very substantial investment in plant and equipment.

[12] MSW combustion ash amounts to approximately 25 percent (dry weight) of unprocessed MSW input. *1992 Update* at 3-3. Accordingly, the tipping fee for each ton of MSW processed would generally include the cost to dispose of 0.25 tons of ash (*i.e.*, 25 percent of $453 or approximately $113). With the increases in ash disposal cost noted above, a tipping fee currently in the range of $50 per ton of MSW processed (*see supra* note 11) would triple.

that results from the court of appeals' interpretation of section 3001(i) cannot be reconciled with Congress' intent to encourage resource recovery facilities.

The additional cost burden is, moreover, a very troubling prospect for communities across the United States who already face fiscal problems. Protection of public health and the environment is a primary concern of *amici* and a principal factor underlying development of resource recovery facilities by the communities *amici* represent. Nevertheless, the cost of complying with federal environmental mandates has become a serious concern for local government. *See* Ohio Municipal League, *Ohio Metropolitan Area Cost Report for Environmental Compliance* (September 15, 1992); Municipality of Anchorage, Alaska, *Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties* (January 1993). As a result of the court of appeals' decision, *amici* and many communities across the United States that are already grappling with serious fiscal problems now face an additional burden—a dramatic increase in waste management costs far beyond the level of cost anticipated when those communities chose resource recovery facilities as an environmentally sound solid waste management strategy. The result could be to force many existing resource recovery facilities to shut down, and future development of new facilities would essentially be eliminated, all of which is contrary to RCRA's policy of encouraging resource recovery and alternatives to land disposal of solid wastes.[13]

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[13] It is likely to be more economic for many communities to shut down their resource recovery facilities, landfill the communities' MSW, and pay the associated landfill tipping fees as well as the fixed costs on the dormant resource recovery facilities rather than operate the facilities and have to absorb the cost to manage ash residue as hazardous waste. *See supra* notes 11 and 12. Moreover, the potential liability associated with navigating the complex scheme

The decision below also is incompatible with RCRA's goals of protecting public health and the environment. In support of its decision that MSW ash must be treated as hazardous waste, the court of appeals stated that "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills." 948 F.2d at 352. But contrary to the court of appeals' assumption, MSW combustion ash poses less environmental concern than the alternative that the court's decision necessarily encourages, landfilling of MSW. *See supra* note 9. *See also* State of Florida, Division of Administrative Hearings, *Final Order Approving Certification,* Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility (No. 90-3942EPP), at 3-4 (June 19, 1992) (adopting Recommended Order's finding of fact ¶ 7 (December 9, 1991) that leachate from MSW combustion ash is far less of an environmental concern than the leachate from MSW); U.S. Environmental Protection Agency, *Characterization of Municipal Waste Combustion Ash, Ash Extracts and Leachates,* EPA/530-SW-90-29A (March 1990) (leachate from ash monofills generally meets EPA's drinking water standards). In fact, MSW combustion ash is now being beneficially reused in a variety of applications, including road construction and as a raw material in cement manufacturing. *See* Richard W. Goodwin, *Defending the Character of Ash,* Solid Waste & Power 18, 19-20 (September/October 1992) (as a result of the lime used by the pollution control systems of many resource recovery facilities, the ash residue contains concrete-like mineral end products that prevent heavy metals from being released into the leachate); *see also* N.Y. Comp. Codes R. & Regs. title 6, § 360-3.5(h)

of federal hazardous waste regulations would further discourage the use of resource recovery facilities, in direct contradiction of Congress' policy of encouraging these facilities.

(requirements for approval of beneficial use of MSW ash residues); Fla. Admin. Code Ann. r. 17-702.600 (requirements for recycling MSW ash residue).[14]

Finally, the court of appeals' decision raises potentially serious implications for our Nation's limited hazardous waste landfill capacity. It has been estimated that as of the end of 1987, the United States had 34 million tons of hazardous waste landfill capacity.[15] Given the difficulty of siting hazardous waste landfills, significant additional capacity is unlikely to become available soon.[16] On the other hand, resource recovery facilities currently in operation produce approximately 8.5 million tons of ash each year. *See supra* p. 6. If ash must now be disposed in hazardous waste landfills, it can readily be seen that all

[14] The Seventh Circuit's above-quoted statement also appears to have been made without considering the record in this case. The waste combustion ash directly at issue here (from Chicago's Northwest Waste-to-Energy Plant) is disposed in Michigan at a monofill (a sanitary landfill that receives only municipal incinerator ash) that is lined and equipped with ground water monitoring and leachate collection systems. Petition for a Writ of Certiorari, S. Ct. Case No. 92-1639, at 7. Those disposal standards are required by Michigan law, Mich. Comp. Laws § 299.432a, and are typical of the laws of a number of other states. *See, e.g.,* Mass. Regs. Code title 310, § 19.119; Fla. Admin. Code Ann. r. 17-702.570. *See also* 40 C.F.R. part 258 (adopting stringent federal criteria for municipal landfills and monofills receiving MSW combustion ash).

[15] *Regulation of Municipal Solid Waste Incinerators: Hearing on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce,* 101st Cong., 1st Sess. 198 (1989) (testimony of David L. Sokol, Chairman of the Institute of Resource Recovery). EPA has not published an estimate of hazardous waste landfill capacity in the United States.

[16] Of the 20 hazardous waste landfills in the United States, only one (Last Chance, Colorado hazardous waste landfill) has been permitted during the past twelve years. *See* William Gruber, *TSD Summary 1993,* EI Digest 14, 17 (January 1993); Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information,* EI Digest 24 (March 1992).

of the United States' current hazardous waste landfill capacity could be consumed within a very short period, thereby creating a hazardous waste management crisis.

In sum, the court of appeals' decision ignores the plain meaning and legislative intent of section 3001(i). As a result, the decision jeopardizes the viability of existing resource recovery facilities and the development of new facilities, and encourages environmentally inferior alternatives (such as landfilling) for managing municipal solid waste, all of which is contrary to RCRA's policy and objectives.

II. THE EPA ADMINISTRATOR'S INTERPRETATION OF RCRA SECTION 3001(i) THAT RESOURCE RECOVERY FACILITY ASH IS EXEMPT FROM HAZARDOUS WASTE REGULATION IS ENTITLED TO DEFERENCE

Amici submit that RCRA section 3001(i), based on its plain meaning as well as the overall legislative context of RCRA's policies and objectives, exempts resource recovery facility ash from hazardous waste regulation. Nevertheless, should this Court conclude that section 3001(i) is ambiguous with regard to the regulatory treatment of resource recovery facility ash residue, deference to the EPA Administrator's reasonable interpretation of section 3001(i) is warranted. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

When certiorari was initially granted in this matter, the decision below was remanded to the court of appeals for further consideration in light of the EPA Administrator's September 18, 1992 memorandum, *supra* p. 16. *See* 113 S. Ct. at 486. That memorandum concluded that the exemption of resource recovery facility ash from hazardous waste regulation is consistent with the language of section 3001(i) and its legislative history, and best serves RCRA's goals of protecting the environment and promoting resource recovery. EPA Administrator's Memorandum, Pet. App. at 49a. On remand, the Seventh Circuit

summarily declined to defer to the EPA Administrator's interpretation reasoning that it was yet another change in EPA's interpretation of section 3001(i). 985 F.2d at 304.

The EPA provided its initial interpretation of section 3001(i) in the regulatory preamble that accompanied codification of section 3001(i) in EPA's hazardous waste management regulations. 50 Fed. Reg. 28702, 28725 (July 15, 1985). While noting that it did not interpret section 3001(i) as exempting MSW ash from hazardous waste regulation if that ash "routinely exhibits" a hazardous waste characteristic, EPA concluded its discussion of section 3001(i) by stating that the Agency:

> does not believe the [1984 RCRA amendments—including section 3001(i)] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

Id. at 28726. The concluding statement strongly suggests that MSW ash is exempt from hazardous waste regulation as it had been under the household waste exclusion.[17]

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[17] Subsequent congressional testimony demonstrates EPA's ongoing analysis of the issue. *See Resource Conservation and Recovery Act—Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 427-428 (1987) (statement of J. Winston Porter, EPA Asst. Administrator, Office of Solid Waste and Emergency Response) (after reconsidering its 1985 statement that ash could be hazardous, the Agency believes it may have been in error); *Regulation of Municipal Solid Waste Incinerators, supra* note 15, at 33 (statement of Sylvia Lowrance, EPA Director, Office of Solid Waste) (EPA continues to follow its 1985 interpretation, but believes the statute needs to be clarified).

The EPA Administrator's September 1992 memorandum conclusively and authoritatively reaches that same conclusion: resource recovery facility ash is not subject to regulation as a hazardous waste. As explained in that memorandum, EPA believes that its interpretation is consistent with the text and legislative history of section 3001(i) and best serves that statute's goals of protecting the environment and promoting resource recovery. EPA Administrator's Memorandum, Pet. App. at 49a. The Administrator's interpretation is also supported by EPA's recent adoption of stringent criteria for municipal landfills and monofills that receive MSW ash, including siting restrictions, facility design and operating criteria, and ground water monitoring requirements. *Id.* at 46a-47a. *See supra* note 14.

Contrary to the court of appeals' conclusion, the evolution of EPA's analysis on this important issue does not summarily negate the deference due to the final decision expressed in the EPA Administrator's memorandum. *See Chevron,* 467 U.S. at 863-64 (revised agency interpretations deserve deference, as administrative agencies must consider the wisdom of their policies on a continuing basis). Moreover, even "sharp breaks" with prior agency interpretations are entitled to deference, *Rust v. Sullivan,* 111 S. Ct. 1759, 1769 (1991) (quoting *Chevron,* 467 U.S. at 862), where the revised interpretation is supported by a reasoned analysis. *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 42 (1983).

In this case, even if the EPA Administrator's memorandum can be considered a "sharp break" from a well-settled interpretation, deference is required because the "changed" interpretation is supported by a reasoned analysis. Specifically, as explained in the EPA Administrator's memorandum, the conclusion that MSW ash is exempt from hazardous waste regulation is based on the Agency's analysis of the plain language and legislative intent of section

3001(i), the statutory policies encouraging resource recovery facilities, and environmental and solid waste management policy considerations. *Cf. Rust,* 111 S. Ct. at 1769 (agency's change in interpretation justified where prior policy failed to implement the statute properly and the new regulations are more consistent with the original intent of the statute). The conclusion reached by the Administrator's memorandum is the only permissible interpretation of RCRA section 3001(i). To deny deference to an agency interpretation which revises a prior internally inconsistent interpretation of the statutory language is irrational.

Thus, to the extent this Court finds the language of section 3001(i) to be ambiguous, deference should be granted to the EPA Administrator's reasonable interpretation of the statute, namely, that resource recovery facility ash is not subject to hazardous waste regulation under RCRA.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.